IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LAUTIC FORDHAM, II, et al.	:	**CIVIL ACTION**
	:	
v.	:	**NO. O6-CV-3915**
	:	
AGUSTA WESTLAND N.V., et al.	:	
	:	

MEMORANDUM AND ORDER

Kauffman, J. **January 11, 2007**

Plaintiffs Lautic Fordham, II, William Keeth, Don Phillips, and Scott Yerk ("Plaintiffs") bring this action against Defendants Agusta Westland N.V. t/d/b/a Augusta Westland ("N.V."), Augusta Aerospace Corporation ("AAC"), and Augusta Philadelphia (collectively, "Defendants") alleging national origin discrimination and retaliation in violation of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000(e), et seq. ("Title VII") and the Pennsylvania Human Relations Act, 43 Pa. Const. Stat. §§ 951, et seq. ("PHRA"). Now before the Court is Defendants' Motion to Dismiss the Complaint. For the reasons that follow, the Motion will be granted in part and denied in part.

I. Background

Accepting as true the facts alleged in the Complaint, as we must at this stage of the proceedings, the pertinent facts are as follows. Plaintiffs, United States citizens, were hired by Defendants in Philadelphia and sent to Italy to be trained. Amended Complaint ¶¶ 22-23. During their employment and training, Plaintiffs suffered anti-American discrimination. Id. at ¶ 24. The alleged discriminatory practices consisted of the following: (a) upon their arrival in Italy, Plaintiffs were assigned to the "production floor" rather than receive training; (b) they were

instructed to park in an area separate and apart from the non-American employees; (c) they were assigned to work hours less favorable than those required of non-American employees; (d) they were denied lunch breaks provided to non-American employees; (e) they were denied shift differential pay; (f) they were disciplined for infractions for which non-American employees were not disciplined; (g) they were treated in a demeaning manner; and (h) they were improperly reprimanded for their performance at a time when they were supposed to be in training. Id. Plaintiffs complained to Defendants about their treatment. Id. at ¶ 25. In retaliation for these complaints, Plaintiffs were forced to resign. Id. at ¶ 27. In February 2005, Plaintiffs filed written charges of discrimination with the EEOC, alleging national origin discrimination and retaliation. Id. at ¶ 19. On or about June 6, 2006, the EEOC issued Notices of Right to Sue on the charges. Id.

Defendants move to dismiss this action (1) as against N.V. for improper service pursuant to Fed. R. Civ. P. 12(b)(5); (2) as against N.V. for failure to exhaust administrative remedies pursuant to Fed. R. Civ. P. 12(b)(6); (3) as against N.V. for lack of in personam jurisdiction pursuant to Fed. R. Civ. P. 12(b)(2); (4) as against all Defendants for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6).

II. Legal Standard

In order for a court to exercise jurisdiction over a defendant, a plaintiff must serve that defendant with process. See Fed. R. Civ. P. 4; Trueposition, Inc. v. Sunon, Inc., 2006 WL 1686635, at *2 (E.D. Pa. June 14, 2006). The defendant must be subject to personal jurisdiction "under the law of the state where the district court sits." Pennzoil Prods. Co. v. Colelli & Assocs., Inc., 149 F.3d 197, 200 (3d Cir. 1998). Service abroad on a foreign corporation is

governed by the terms of the "Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents." Fed. R. Civ. P. 4(f). See Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 696-700 (1988); McCarron v. British Telecom, 2001 WL 632927, at *1 (E.D. Pa. June 6, 2001). On a motion to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of demonstrating that the court has jurisdiction over the defendant. Mellon Bank (East) PSFS, National Assoc. v. Kenneth, 960 F.2d 1217, 1223 (3d Cir.1992); TJF Associates, LLC. v. Kenneth J. Rotman & Allianex, LLC., 2005 WL 1458753, at *3 (E.D. Pa. June 17, 2005).

In considering a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), the Court may look only to the facts alleged in the complaint and its attachments. Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1261 (3d Cir. 1994). The Court must accept as true all well-pleaded allegations of the complaint and view them in the light most favorable to the plaintiff. Angelastro v. Prudential-Bache Sec., Inc., 764 F.2d 939, 944 (3d Cir. 1985). A Rule 12(b)(6) motion will be granted only when no relief could be granted under any set of facts that could be proved by the plaintiff. Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988).

III. Discussion

Defendant N.V. argues that the Court need not reach the substance of Plaintiffs' claims because of three threshold defects: (a) insufficiency of service of process; (b) failure to exhaust administrative remedies; and (c) lack of personal jurisdiction. All Defendants also seek dismissal of the Complaint for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6). See Motion to Dismiss, at 3-8.

A. Insufficient Service of Process

Defendant N.V. argues that because it is a foreign corporation established and operating in the Netherlands, Plaintiffs were required to serve it in accordance with the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents. See Declaration of Vincent Genovese in Support of Augusta Westland N.V's Motion to Dismiss (hereinafter, "Genovese Decl."), ¶¶ 3-4. Plaintiffs do not dispute that service in accordance with the Hague Convention is required, but request that the Court grant them additional time to effectuate service. Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss (hereinafter, "Op. Mem."), at 6.

When reviewing a motion to dismiss for insufficient service of process under Federal Rule of Civil Procedure 12(b)(5), the Court has "broad discretion to either dismiss the plaintiff's complaint for failure to effect service or to simply quash service of process." Umbenhauer v. Woog, 969 F.2d 25, 30 (3d Cir. 1992). "However, dismissal of a complaint is inappropriate when there exists a reasonable prospect that service may yet be obtained." King v. Timmoney, 2003 WL 22436228, at *3 (E.D. Pa. Oct. 24, 2003) (internal quotations omitted). Since failure to serve is not necessarily fatal to Plaintiffs' claims, the Court will review the alleged defects for which dismissal may be mandatory.

B. Failure to Exhaust Administrative Remedies

Plaintiffs seek redress for unlawful national origin discrimination and retaliation under Title VII and the PHRA. It is well-settled that before a plaintiff may bring suit under Title VII or the PHRA, he must exhaust administrative remedies by filing a charge of discrimination with the

EEOC and obtaining a notice of the right to sue in federal court. 42 U.S.C. § 2000e-5; Burgh v. Borough Council of Borough of Montrose, 251 F.3d 465, 470 (3d Cir. 2001). N.V. argues that Plaintiffs have failed to meet the exhaustion requirement because they did not name N.V. in their EEOC complaint. See Motion to Dismiss, at 9-10.

As a general rule, a plaintiff may not bring a Title VII action against a party not named in the EEOC charge. Christaldi-Smith v. JDJ, Inc., 367 F. Supp.2d 756, 763 (E.D. Pa. 2005) (citing Schafer v. Bd. of Pub. Educ., 903 F.2d 243, 252 (3d Cir. 1990)). A narrow exception has been carved out in situations where the unnamed party has received notice of the allegations and where there is sufficient "commonality of interest" between the named and unnamed parties. Schafer , 903 F.2d at 252; McLaughlin v. Rose Tree Media School Dist., 52 F. Supp.2d 484, 492 (E.D. Pa. 1999). However, the applicability of this exception has been limited to plaintiffs who were not represented by counsel at the time the EEOC complaint was filed. Cronin v. Martindale Andres & Co., 159 F. Supp.2d 1, 9 (E.D. Pa. 2001); see also Darden v. DaimlerChrysler North America Holding Corp., 191 F. Supp.2d 382, 390 (S.D.N.Y. 2002) (holding that commonality of interest exception is not applicable to permit Title VII suit against party not named in EEOC charge where plaintiff had the benefit of counsel when he filed EEOC charge).

Plaintiffs do not dispute that N.V. was not named in the EEOC charge, but argue that they are entitled to the benefit of the exception because "N.V. shares a commonality of interest [with AAC] and because [N.V.] was on notice that it was involved in Plaintiffs' EEOC charges." Op. Mem. at 6-7. Nor do Plaintiffs dispute Defendants' allegation that they were represented by counsel during the administrative proceedings. Instead, they do not address the limited applicability of the exception to complainants who were not represented by counsel during

EEOC proceedings. See Cronin, 159 F. Supp.2d at 9; Christaldi-Smith, 367 F. Supp.2d at 763, n. 3. Since Plaintiffs did not name N.V. in their EEOC charge, and have not shown that they are entitled to the benefit of the narrowly-drawn "commonality of interest" exception, they have failed to exhaust their administrative remedies and the claims against N.V. will be dismissed without prejudice.

C. Personal Jurisdiction

Defendant N.V. also seeks dismissal of Plaintiffs' claims on the basis of lack of personal jurisdiction pursuant to Fed. R. Civ. P. 12(b)(2), arguing that N.V., a foreign corporation, does not transact business in Pennsylvania. See Genovese Decl. at ¶ 4. It is well-recognized that personal jurisdiction is a threshold matter that should be resolved before a Court may delve into the merits of a claim. See Vetrotex Certainteed Corp. v. Consolidated Fiber Glass Products Co., 75 F.3d 147, 154 (3d Cir. 1996). Because Plaintiffs may not rely on pleadings alone to carry their burden of establishing personal jurisdiction, Genesis Intern. Holdings v. US-Algeria Business Council, 2006 WL 1210424, at *1 (D.N.J. May 1, 2006), they are seeking leave to engage in limited discovery in order to respond to Defendants' jurisdictional challenge. Op. Mem. at 6.[1] While the Court would ordinarily consider such a request for good cause shown, the burden that would be imposed on N.V. should the Court grant Plaintiffs' request is unjustified when it is clear from the present record that Plaintiffs have not exhausted their administrative

[1] However, as Defendants point out, Plaintiffs cannot reasonably take discovery from a party they have not yet properly served. See Lampe v. Xouth, Inc., 952 F.2d 697, 701 (3d Cir. 1991) (holding that effective service of process is a prerequisite to proceeding further in a case).

remedies with respect to this Defendant.[2] In Robinson v. Dalton, 107 F.3d 1018, 1022 (3d Cir. 1997), the Third Circuit instructed that a district court may dispose of a claim for failure to exhaust administrative remedies on the basis of lack of subject matter jurisdiction only when it is clear on the face of the pleadings that the administrative remedies have not been exhausted. In this case, the Court need not look beyond the parties' initial submissions to reach its conclusion regarding exhaustion. Since N.V. will be dismissed from this action on the basis of failure to exhaust, the jurisdictional issue is now moot.

D. Fed. R. Civ. P. 12(b)(6) Analysis

Title VII prohibits employment discrimination on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2. It also prohibits any form of retaliation based on an employee's opposition to discriminatory practices made unlawful under the statute. 42 U.S.C. § 2000e-3; see also Petruska v. Gannon Univ., 462 F.3d 294, 303 (3d Cir. 2006); Davis v. Glanton, 107 F.3d 1044, 1052 (3d Cir. 1997). Claims arising under the PHRA are governed by the same legal standard. Lepore v. Lanvision Systems, Inc., 113 Fed. Appx. 449, 452 (3d Cir. 2004).

Plaintiffs allege that at least part if not all of the discrimination they suffered took place in Italy. See Amended Complaint ¶ 24. With respect to the extraterritorial nature of these claims, Section 109 of the 1991 Civil Rights Act extends Title VII protection to U.S. citizens working for American companies abroad, but does not regulate the activity of foreign corporations unless they are "controlled" by an American enterprise. Pub. L. No. 102-166, 105 Stat. 1071 (1991);

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[2] By urging the Court to dismiss the claims against N.V. for failure to exhaust administrative remedies, Defendants appear to have consented to this Court's exercise of jurisdiction with respect to this question. See Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 584 (1999) (defense of personal jurisdiction is subject to waiver).

Estate of Reynolds v. Martin, 985 F.2d 470, 472 (9th Cir. 1993); Crumley v. Delaware State College, 797 F. Supp. 341, 344 (D. Del. 1992); Watson v. CSA, Ltd., 376 F. Supp.2d 588, 593 (D. Md. 2005) ("if an American employer is deemed to control the foreign company, any Title VII violation by the foreign company is presumed to constitute a violation by the American employer" (internal quotations omitted)).[3] To the extent N.V. is a foreign entity, the Title VII claims against it cannot prevail unless it is controlled by an American company.[4] However, since Plaintiffs have also named other defendants, including AAC, N.V.'s American affiliate, see Amended Complaint ¶¶ 12-13, the Court will review the discrimination claim.

To state a prima facie case for national origin discrimination under Title VII or the PHRA, Plaintiff must allege that 1) he is a member of a protected class; 2) he is qualified for the job from which he was discharged; 3) he suffered an adverse employment action; and 4) others not in the protected class were treated more favorably. See Proctor v. ARMDS, Inc., 2006 WL 3392932, at *5 (D.N.J. 2006); McCauley v. Computer Aid Inc., 447 F. Supp.2d 469, 477 (E.D. Pa. 2006). An adverse employment action within the meaning of the statute means an action by an employer that alters the employee's compensation, terms, conditions, or privileges of employment. See Moore v. City of Philadelphia, 461 F.3d 331, 341 (3d Cir. 2006).

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[3] The factors to be considered in determining whether a foreign corporation is controlled by an American employer are: (a) the interrelation of operations; (b) the common management; (c) the centralized control of labor relations; and (d) the common ownership or financial control, of the employer and the corporation. 42 U.S.C. § 2000e-1(c)(3). Watson, 376 F. Supp.2d at 594.

[4] Since N.V. will be dismissed from this action on exhaustion grounds, the Court need not address this issue.

In the present case, Plaintiffs allege that they are Americans, that they were hired in the United States and sent abroad for training, that they suffered adverse actions such as denial of differential pay, paid lunch breaks, and adequate training, as well as mistreatment on account of their national origin. Plaintiffs also have alleged that their non-American counterparts were not subjected to such adverse actions. Since Plaintiffs have alleged sufficient facts to state a claim for discrimination on the basis of national origin, Defendants' motion to dismiss the discrimination claim will be denied.

Plaintiffs also bring a retaliation claim under Title VII and the PHRA, alleging that Defendants retaliated against them for complaining to their employers about the alleged discrimination and filing a charge with the EEOC. To state a claim for retaliation, a plaintiff must allege that 1) he engaged in protected activity; 2) he suffered an adverse action; and 3) a causal link exists between the protected activity and the adverse action. Hopkins v. Elizabeth Bd. of Educ., 2005 WL 1899333, at *6 (D.N.J. Aug. 5, 2005) (citing Kachmar v. SunGard Data Sys. Inc., 109 F.3d 173, 177 (3d Cir. 1997)). Plaintiffs allege that after they complained to their employers about the alleged discrimination and filed an EEOC complaint, they were retaliated against and suffered further discrimination. Drawing all inferences in Plaintiffs' favor, the Court cannot conclude at this stage in the proceedings that no relief could be granted under any set of facts that could be proved by Plaintiffs. Accordingly, Defendants' motion to dismiss the retaliation claim will be denied.

IV. Conclusion

For the foregoing reasons, Defendants' Motion to Dismiss will be granted in part and denied in part. All claims against Defendant N.V. will be dismissed for failure to exhaust

administrative remedies. The Motion to Dismiss the Title VII and retaliation claims will be denied with respect to the remaining Defendants. An appropriate Order follows.

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	:	

ORDER

AND NOW, this 11th day of January, 2007, upon consideration of Defendants' Motion to Dismiss (docket no. 7) and all responses thereto, and for the reasons stated in the accompanying Memorandum, it is **ORDERED** that the Motion is **GRANTED** with respect to Defendant Augusta Westland N.V. and **DENIED** with respect to the remaining Defendants. Accordingly, all claims against Defendant Augusta Westland N.V. are **DISMISSED** without prejudice.

BY THE COURT:

/s/ Bruce W. Kauffman
BRUCE W. KAUFFMAN, J.